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U.S. Citizenship and Immigration Services

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FILE: WAC 03 021 54602 Office: CALIFORNIA SERVICE CENTER Date: JAN 11 2005

IN RE: Petitioner:
Beneficiary

PETITION: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(1)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the employment-based petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a corporation organized in the State of California in November 1999. It imports and wholesales handicrafts and gifts. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(1)(C), as a multinational executive or manager.

The director determined that the petitioner had not established: (1) that the beneficiary would be employed in a primarily managerial or executive capacity for the United States entity, or (2) that it has a qualifying relationship with the beneficiary's foreign employer.

On appeal, the petitioner submits a letter and attachments in response to the director's decision.

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> * * *
>
> (C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement that indicates that the alien is to be employed in the United States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien. *See* 8 C.F.R. § 204.5(j)(5).

The first issue in this proceeding is whether the beneficiary will be employed in a managerial or executive capacity for the United States entity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), provides:

> The term "managerial capacity" means an assignment within an organization in which the employee primarily
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> i. manages the organization, or a department, subdivision, function, or component of the organization;
>
> ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
>
> iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
>
> iv. exercises discretion over the day to day operations of the activity or function for which the employee has authority. A first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), provides:

> The term "executive capacity" means an assignment within an organization in which the employee primarily
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> i. directs the management of the organization or a major component or function of the organization;
>
> ii. establishes the goals and policies of the organization, component, or function;
>
> iii. exercises wide latitude in discretionary decision making; and
>
> iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In an October 25, 2002 letter appended to the petition, the petitioner provided a statement of the beneficiary's current position and credentials:

> [The beneficiary] is our chief Executive Officer and was manging [sic] Partner in India, he is managing day to day [sic] operations of the corporation and represents corporation in numerous trade Shows [sic] and fairs and deals with the buyers and wholesalers of the company products, He [sic] also hires sales executives who book orders for the company and ship the orders. He is assisting the corporation to get more new products, buyers and arrange funds from banks and other lending organizations. Marketing Research and and [sic] incorporation sales strategy and he takes all decision on day to day [sic] running of the corporation. He Has [sic] masters degree in Business Management and Diplomas in International and Business Management (Copies attached).

The director requested, among other things: (1) the petitioner's organizational chart as of October 28, 2002, the date of filing the petition, including the names of all executives, managers, supervisors and number of employees within each department or subdivision; (2) a list of all employees under the beneficiary's supervision by name and job title and brief description of job duties; (3) a more detailed description of the beneficiary's job duties in the United States; and, (4) the petitioner's California Forms DE-6, Employer's Quarterly Wage Report, for the fourth quarter of 2002 and the first quarter of 2003.

In a June 19, 2003 response, the petitioner provided its organizational chart showing the beneficiary in the position of president, an honorary secretary, a sales representative, and a shipping clerk. The petitioner described the beneficiary's duties as including:

> Defining the marketing strategies and implantation mechanism.
>
> Managing all the operations and taking all the major decisions of the corporation.
>
> Representing the corporation in numerous trade shows, fairs and deals with the buyers and the wholesale buyers of the company products.
>
> Hiring sales executives who books [sic] orders for the company and other staff who ship orders.
>
> Assists the corporation in getting more new products, buyers.
>
> Arranges funds from banks and other leading organizations.
>
> His experience in the gem industry and knowledge of handicraft in evaluating and valuing them makes him the best individual available to communicate with the buyers.

The petitioner stated that: the petitioner's "honorary secretary" provided legal work for the company but received no annual wage; the petitioner's sales representative sold products to shopkeepers and other retailers,

assisted in trade shows by setting up and dismantling the booth and received an annual salary of $14,400 plus commission; and, the petitioner's shipping clerk was responsible for cargo pickup and delivery and collection of payments and received an annual wage of $10,800. The petitioner's California Form DE-6 for the quarter in which the petition was filed confirmed the employment of the beneficiary, the sales representative, and the shipping clerk.

The director determined that the petitioner's job description of the beneficiary's duties did not establish that the beneficiary would primarily direct the management of the organization, establish the company's policies and goals, exercise wide latitude in discretionary decision-making, and maintain autonomy over the petitioner's operations. The director, quoting *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988), observed that a beneficiary who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. The director determined that it was reasonable to believe that with the petitioner's organizational structure and type of business, the beneficiary would assist with the petitioner's day-to-day non-supervisory duties. The director concluded that the beneficiary "is only a first-line manager who is not supervising professional employees."

On appeal, the petitioner claims that the beneficiary is its decision-maker and policy and goal setter and that he is the key man in the United States office. The petitioner asserts that there should be no discrimination against a company because of its small size. The petitioner notes that it has created two jobs in addition to the beneficiary.

The petitioner's assertions are not persuasive. When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 204.5(j)(5). The petitioner has not established that the beneficiary's tasks for the petitioner are primarily executive or managerial tasks. For example, the beneficiary is responsible for "[d]efining the marketing strategies," and "[r]epresenting the corporation in numerous trade shows, fairs and deals with the buyers and the wholesale buyers of the company products," and "[assisting] the corporation in getting more new products, buyers." These are the duties of an individual performing the petitioner's marketing, promotion, and sales tasks. As the director observed, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988).

The petitioner correctly observes that a company's size alone may not be the determining factor in denying a visa to a multinational manager or executive. *See* section 101(a)(44)(C), 8 U.S.C. § 1101(a)(44)(C). However, it is appropriate for Citizenship and Immigration Services (CIS) to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. *See, e.g. Systronics Corp. v. INS,* 153 F. Supp. 2d 7, 15 (D.D.C. 2001). In this matter, the petitioner has not provided evidence that the beneficiary will be relieved from primarily performing the petitioner's operational, sales, and marketing tasks. Going on record without supporting documentary evidence is not sufficient for purposes of

meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972).

The petitioner's claim that the beneficiary is its decision-maker and policy and goal setter and that he is the key man in the United States office does not establish the beneficiary's executive or managerial capacity. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.). Moreover, the petitioner has not articulated how its reasonable needs justify the beneficiary's performance of primarily non-qualifying duties.

On review, the petitioner has not presented sufficient evidence to establish that the beneficiary's duties for the petitioner will include primarily executive or managerial duties.

The next issue in this proceeding is whether the petitioner has established a qualifying relationship with the beneficiary's foreign employer. In order to qualify for this visa classification, the petitioner must establish that a qualifying relationship exists between the United States and foreign entities in that the petitioning company is the same employer or an affiliate or subsidiary of the foreign entity. *See* section 203(b)(1)(C) of the Act.

The regulation at 8 C.F.R. § 204.5(j)(2) states in pertinent part:

> *Affiliate* means:
>
> (A) One of two subsidiaries both of which are owned and controlled by the same parent or individual;
>
> (B) One of two legal entities owned and controlled by the same group of individuals, each individual owning and controlling approximately the same share or proportion of each entity.
>
> *Multinational* means that the qualifying entity, or its affiliate, or subsidiary, conducts business in two or more countries, one of which is the United States.
>
> *Subsidiary* means a firm, corporation, or other legal entity of which a parent owns, directly or indirectly, more than half of the entity and controls the entity; or owns, directly or indirectly, half of the entity and controls the entity; or owns, directly or indirectly, 50 percent of a 50-50 joint venture and has equal control and veto power over the entity; or owns, directly or indirectly, less than half of the entity, but in fact controls the entity.

The petitioner has presented the following evidence in support of its claim that it is a wholly owned subsidiary of the beneficiary's foreign employer.

> Stock certificate number 1 issued to Vikas Gems, India in the amount of 100 shares;

An undated statement from the foreign entity's accountant that the beneficiary is an equal partner in the foreign entity and that his profit sharing ratio is one-third.

The petitioner's 1999 Internal Revenue Service (IRS) Form 1120, with Attachment Form 5473 showing Vikas Gems as a direct 25 percent or more foreign shareholder;

A copy of a wire transfer advice dated November 19, 1999, showing Rajeev Bafna, partner Vikas Gems, as the originator and the petitioner as beneficiary of a $20,000 transfer less fees;

The petitioner's checking account statement for November 1999 showing a credit of $19,932.45 from a wire transfer deposit;

California Notice of Transaction dated February 2, 2000 showing the petitioner's total offering for the value of stock sold was $40,000 and that $20,000 in money had been paid for the stock;

The petitioner's explanation that in 2002 a partner of the foreign entity wire transferred $20,000 to the petitioner as application and allotment money; and that in April 2001 the foreign entity gave the beneficiary an additional $6,000 by traveler's check for deposit to the petitioner's account and that in July 2001, the foreign entity gave Yashwant Bafna, one of the foreign entity's partners, an additional $15,000 in traveler's checks for deposit to the petitioner's account in response to the petitioner's call for the remaining purchase price. Copies of traveler's check receipts and the petitioner's checking account statements confirming these transactions.

The petitioner's IRS Form 1120 for 2000, Schedule L, Line 22(b) showing common stock valued at $20,000 at the beginning and end of the year;

The petitioner's IRS Form 1120 for 2001, Schedule L, Line 22(b) showing common stock valued at $20,000 at the beginning of the year and $40,000 at the end of the year;

The petitioner's IRS Form 1120 for 2002, Schedule L, Line 22(b) showing common stock valued at $40,000 at the beginning and end of the year;

The director observed that the petitioner's 2000, 2001, and 2002 IRS Forms 1120 also show on attached statements that the beneficiary owns 100 percent of the petitioner. The director also noted that the petitioner had not indicated that the petitioner was a subsidiary in an affiliated group or parent-subsidiary controlled group on its IRS Forms 1120.

The petitioner explained on appeal that the discrepancies regarding ownership in the petitioner's IRS Forms 1120 are due to the United States accountant who prepared the petitioner's tax returns. The petitioner also states "Rajeev Bafna is the 100% owner of the corporation is not correct as the corporation was incorporated

by Yashwant Bafna and money was send [sic] by Vikas Gems India." The petitioner also references the business relationship between the two concerns, the use of the name "Vikas" in both concerns, and the previous approval of the beneficiary's L-1A intracompany transferee petition, as evidence of a qualifying relationship.

The petitioner's evidence is not persuasive. The regulation and case law confirm that ownership and control are the factors that must be examined in determining whether a qualifying relationship exists between United States and foreign entities for purposes of this visa classification. *Matter of Church Scientology International*, 19 I&N at 593; *see also Matter of Siemens Medical Systems, Inc.*, 19 I&N Dec. 362 (BIA 1986); *Matter of Hughes*, 18 I&N Dec. 289 (Comm. 1982). In context of this visa petition, ownership refers to the direct or indirect legal right of possession of the assets of an entity with full power and authority to control; control means the direct or indirect legal right and authority to direct the establishment, management, and operations of an entity. *Matter of Church Scientology International*, 19 I&N Dec. at 595.

As general evidence of a petitioner's claimed qualifying relationship, stock certificates alone are not sufficient evidence to determine whether a stockholder maintains ownership and control of a corporate entity. The corporate stock certificate ledger, stock certificate registry, corporate bylaws, and the minutes of relevant annual shareholder meetings must also be examined to determine the total number of shares issued, the exact number issued to the shareholder, and the subsequent percentage ownership and its effect on corporate control. Additionally, a petitioning company must disclose all agreements relating to the voting of shares, the distribution of profit, the management and direction of the subsidiary, and any other factor affecting actual control of the entity. *See Matter of Siemens Medical Systems, Inc., supra.* In this matter the record does not contain the foreign entity's partnership agreement. In light of the inconsistencies in the petitioner's IRS Forms 1120 regarding the beneficiary's ownership of the petitioner and the method that the foreign entity allegedly used to fund the petitioner, the AAO cannot conclude that the Indian partnership owns and controls the petitioner. Without full disclosure of all relevant documents, CIS is unable to determine the elements of ownership and control.

The AAO notes that a business relationship and the use of the same or similar name do not establish a qualifying relationship. The AAO also notes that many I-140 immigrant petitions are denied after CIS approves prior nonimmigrant I-129 L-1 petitions. *See, e.g., Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Brothers Co. Ltd. v. Sava*, 724 F. Supp. 1103 (E.D.N.Y. 1989). Examining the consequences of an approved petition, there is a significant difference between a nonimmigrant L-1A visa classification, which allows an alien to enter the United States temporarily, and an immigrant E-13 visa petition, which permits an alien to apply for permanent residence in the United States and, if granted, ultimately apply for naturalization as a United States citizen. *Cf.* §§ 204 and 214 of the Act, 8 U.S.C. §§ 1154 and 1184; see also § 316 of the Act, 8 U.S.C. § 1427. Because CIS spends less time reviewing I-129 nonimmigrant petitions than I-140 immigrant petitions, some nonimmigrant L1-A petitions are simply approved in error. *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d at 29-30; *see also* 8 C.F.R. § 214.2(l)(14)(i)(requiring no supporting documentation to file a petition to extend an L-1A petition's validity). Further, the AAO is not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g. Matter of Church Scientology International*, 19 I&N Dec. at 597. It would be absurd to suggest that CIS

or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Beyond the decision of the director, the petitioner has not provided evidence of the beneficiary's actual duties for the foreign entity. The actual duties themselves reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990). Without a specific description of the beneficiary's duties for the foreign entity, the petitioner has not established that the beneficiary was employed in a managerial or executive capacity for the foreign entity.

An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*. 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.